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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/851,208	05/07/2001	Edward Federowicz		3233

7590 09/22/2005

EDWARD FEDEROWICZ  
98 WEST 32ND STREET  
BAYONNE, NJ 07002

EXAMINER

CONLEY, FREDRICK C

ART UNIT PAPER NUMBER

3673

DATE MAILED: 09/22/2005

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**SEP 22 2005**

**GROUP 3600**

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/851,208  
Filing Date: May 07, 2001  
Appellant(s): FEDEROWICZ, EDWARD

Thomas D. Bradshaw  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed June 20, 2005 appealing from the Office action mailed 10/19/04.

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**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

**(2) Related Appeals and Interferences**

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

4,417,638

HARVEY

11-1983

**(9) Objection**

The following ground(s) of rejection are applicable to the appealed claims:

The amendment filed 11/13/02 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: an intake port sleeve is inserted into intake port hole; intake port sleeve is a 1" to 2" plastic port sleeve; plenum member is constructed of a thin sheet of rigid plastic; creating a half inch to the three quarter inch plenum area beneath patient board; Additional half inch square plastic or rubberized pieces are placed across the 20-22' span of board at intervals for support which will permit the constant flow of pressurized air supply; the braces would be glued to patient board to plenum member; holes 48 are fine, needle sized holes, inserted at every half inch per line and where each following line is spaced a quarter inch apart and where each alternating line is offset a quarter inch.

The above objection does not have any bearing on the claims on appeal and will be addressed after the decision.

### **Grounds of Rejection**

Claims 4-5 and 7-9 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 4,417,638 to Harvey.

In reference to claim 4, Harvey discloses an air pallet comprising:

a board 22 having a top and a bottom', and

a plenum member 24 attached to the bottom of the board, wherein the plenum member is adapted to receive a flow of pressurize<sup>4</sup> air through an intake port, the patient board having an intake port hole 28 adapted for receiving the intake pod, and the plenum member further adapted to release the flow through a plurality of holes (24b) in the plenum member to provide a layer of air below the board supporting a load. With regards to the Appellant's recitation the apparatus intended for and supporting a patient or approved for use in a hospital, the invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re 0#0*, 136 USPQ 458, 459 (CCPA 1963).

Regarding claim 5, wherein the plenum member further includes an intake port for receiving the flow of pressurized air (col. 3 lines 22-27).

Regarding claim 7, wherein the flow of pressurized air is delivered from a blower motor through an air hose 16.

In reference to claim 8, Harvey discloses an apparatus comprising:

a board 22 having a top side and bottom', and

a plenum member 24 attached to the bottom of the board, wherein the plenum member is adapted to receive a flow of pressurized air and release the flow downwardly through a plurality of holes (24b) in the plenum member to provide a layer of air below the board supporting a load. With regards to the Appellant's recitation the apparatus intended for and supporting a patient or approved for use in a hospital, the invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

In reference to claim 9, Harvey discloses a patient levitation apparatus for a patient comprising;

a patient board 22 having a top side and a bottom, the board; and

a plenum member 24 attached to the bottom of the board, wherein the plenum member is adapted to receive a flow of pressurized air and release the flow downwardly through a plurality of holes (24b) in the plenum member to provide a layer of air below the patient board supporting the patient. With regards to the Appellant's recitation the apparatus adapted for use on a hospital bed, the invention must result in a structural difference between the claimed invention and the prior art in order to patentably

distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

#### **(10) Response to Argument**

Applicant's arguments filed 6/20/05 have been fully considered but they are not persuasive.

As stated above, the Appellant's recitation a "patient board for use in a hospital" is not a structural limitation. The invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. The air pallet disclosed by Harvey is capable of being used within a hospital therefore it meets the limitations recited in claims 4, 5, 7, and 8.

Furthermore, Since the Appellant fails to establish the structural limitations that meet the design criteria for a device being approved for use in a hospital Harvey does not need to explicitly state that the air pallet is adapted for use on a hospital bed. The Appellant relies on a broad limitation drawn to an intended use of an apparatus but does not establish any clear design criteria and industry standards in the disclosure for which a device is to be approved for hospital use. Absent any clear design criteria and industry standards in the disclosure and any structural difference recited in the claim between the present invention and the air pallet of Harvey the recitation "approved for hospital use" is given little patentable weight since the air pallet clearly meets the Applicant's structural limitations and is capable of being used in a hospital. Clearly, depending on different states and countries, standards are different, as are different circumstances

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(make shift hospitals). The device of Harvey is capable of levitating a patient if necessary and it can be assumed that the device would be approved for use in a hospital warehouse or garage.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

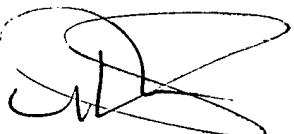
Respectfully submitted,

FC

Conferees:

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